Supreme Court, U.S.
FILED

941339 FEB 2 1995

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KERRY L. MALTBY,

Petitioner,

v.

MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiff filed a civil rights suit for his arrest and 60 days of incarceration based on a violation of his Fourth Amendment constitutional rights and 42 U.S.C. 1983. Plaintiff's arrest was based on the Defendant's belief Plaintiff was a suspect the Defendant saw briefly as the suspect left the scene of an undercover transaction. The Defendant did not check his belief with a fellow officer, who observed the suspect face-to-face during the entirety of the undercover transaction prior to the Plaintiff's arrest, which occurred approximately nine weeks after the transaction. Shortly after the transaction, the informant who arranged it was accused of misconduct in another case and disappeared. The jury was instructed on qualified immunity, found for the Plaintiff and the trial judge entered judgment for the Plaintiff. The questions presented are:

1. Whether a court of appeals can review *de novo* as pure question of law without any deference, the jury and trial judge's application of the standard set for in the case of *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), which imposes liability if a reasonably well-trained police officer in the officer's position would have known his request for a warrant failed to establish probable cause and he should not have applied for it, to the facts of the case, which was made after a lengthy trial.

2. Whether the appellate court properly considered all relevant precedent as required by *Elder v. Holloway*, ____ U.S. ____, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) in reaching its determination that the officer's conduct did not violate clearly established probable cause law in 1987 and that the officer was entitled to judgment in his favor on the basis of qualified immunity as a matter of law.

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Kerry L. Maltby respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra., 1-32) is reported at 36 F.3d 548. The opinions of the District Court (App., infra, 34-43 and 47-68) are unreported.

JURISDICTIONAL STATEMENT

The Seventh Circuit Court of Appeals entered its judgment on September 14, 1994. A timely petition for rehearing was denied on November 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provide in pertinent part:

U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. VII. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Consti-

tution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

42 U.S.C. 1988. (b) Attorney's fees. In any action or proceeding to enforce a provision of sections . . . 1983, . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

A. Overview

The Plaintiff, Kerry Maltby, (hereinafter Maltby) filed a civil rights suit for his arrest and incarceration based on a violation of his Fourth Amendment constitutional rights and 42 U.S.C. 1983 and 1988. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. Section 1331 (general federal jurisdiction question) because the action was based upon 42 U.S.C. 1983 and 1988. The appellate court's jurisdiction over the district court's entry of judgment against Winston, the denial of his post trial motion and the allowance of Maltby's attorney's fees and costs was invoked pursuant to 28 U.S.C. 1291.

On June 4, 1987, an informant, Anthony Hankins (hereinafter Hankins) arranged an undercover transaction in the parking lot of the Rushville, Illinois Dairy Queen, which led to the sale of 1.1 grams of a substance which purported to be LSD. In actuality, the substance was not a controlled substance (T. at 45). The transaction was overseen by the West Central Illinois Drug Task Force (hereinafter Task Force). Michael Sage (hereinafter Sage) served as a Task Force officer and made the purchase from the suspect (T. at 159-63). The transaction lasted 13 minutes (T. at 160). The Defendant, Marty Winston, (hereinafter Winston) served as a Task Force officer and provided surveillance for the transaction (T. at 564). The suspect drove past Winston's position at a distance of about 30 feet as the suspect left the scene

(T. at 127). The suspect's car was travelling at 15 to 20 mph when it passed Winston (T. at 134).

A few days after the Dairy Queen transaction, Hankins was accused of misconduct in his role as an informant (T. at 168-71). The misconduct involved another suspect, Chestnut, with whom Hankins had arranged earlier marijuana purchases by the Task Force. Chestnut offered to sell Sage LSD which was packaged the same as the substance Sage purchased in the Dairy Queen transaction and in another transaction set up by Hankins (T. at 168-9, 189, 206). When Sage declined the offer, Chestnut told Sage Hankins had asked Chestnut to sell the substance and that Hankins intended for Chestnut to split the money he received with Hankins (T. at 170). Hankins disappeared after Winston confronted Hankins with that information and was not seen again until February of 1988 (T. at 50-3, 55-7). Hankins failed to make contact with Winston after Hankins disappeared, which was a violation of Winston's instructions to Hankins regarding his duties as an informant (T. at 59). Criminal charges were filed against Hankins and a warrant was issued for his arrest on July 20, 1987 (T. at 107-9). His status as an informant was terminated on July 21, 1987 (T. at 106).

On August 6, 1987, Winston sought a warrant for Maltby's arrest for the sale of a look-alike substance based on the Dairy Queen transaction (T. at 564). Winston's decision to seek an arrest warrant was based partially on the fact Maltby refused to serve as an informant when he was interviewed by Winston approximately one week prior to Maltby's arrest (T. at 23, 65). Maltby was arrested on August 7, 1987 based on the warrant sought by Winston and held in jail until October 6, 1987 (T. at 565). Maltby was released from jail the day fellow Task Force officer Sage, who viewed the suspect face-to-face for the entirety of the 13 minute Dairy Queen transaction, visited the jail to

view Maltby (T. at 150). After 3 seconds, Sage said "wrong man" (T. at 150-1). Winston turned pale in response (T. at 154). Winston had never checked his identification of Maltby as the suspect with Sage until the day of Maltby's release from jail (T. at 26, 180). Initially that day, Winston had asked Sage to identify a photograph of Maltby because he wasn't "pleading out" (T. at 149). At trial, Winston, other police officers, and Maltby's expert testified about the need for a police officer to consult with all available witnesses. (See *Omitted Facts*, Section 6 infra).

B. Proceedings Below

1. Trial court. Prior to trial, Winston filed a Motion for Summary Judgment on the issue of qualified immunity, a Motion to Reconsider the denial of his summary judgment motion and joined in a Joint Motion to Reconsider filed by all defendants. All motions were denied by the trial court on basis that there were material issues of fact (See App. 47 at 53-56 and 60-63). Winston moved for a directed verdict on the issue of qualified immunity at the end of four days of testimony in the liability phase of the bifurcated jury trial. Winston's motion was denied on the basis that questions of fact on the issue existed (App. 66-67), and the jury was instructed on the law of probable cause and the issue of qualified immunity. The qualified immunity instruction was drawn from *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271, 281 (1986) and stated as follows:

> "The issue of a warrant for plaintiff's arrest protects Defendants from liability unless a reasonably, well-trained police officer in Winston's position would have known that his affidavit or testimony failed to establish probable cause, and that he should not have applied for the warrant." (T. at 693-4 Court's Inst. No. 1., R. Doc. 224).

The jury found in favor of Maltby and against Winston on the issue of liability and awarded Maltby $50,000 for com-

pensatory damages and $2,300 for punitive damages. Winston's oral and written post trial motions for judgment as a matter of law on the issue of qualified immunity were denied (See App. 67-68). After trial, the court awarded $74,086.24 for Maltby's attorney's fees and costs.

2. Appellate court. The appellate court applied a *de novo* standard of review, found Winston was entitled to qualified immunity, and reversed the jury verdicts and the award of attorney's fees and costs. The appellate court acknowledged its *de novo* standard of review was in conflict with other Seventh Circuit unconstitutional arrest cases on the issue. 36 F.3d at 555-556 n.7. For example, see *Mahoney v. Kesery*, 976 F.2d 1054, 1059 (7th Cir. 1992) which applied a clear error standard of review to qualified immunity.

The appellate court held, without reference to the jury's verdict or the trial judge's denial of Winston's motion for judgment that Winston was entitled to qualified immunity as a matter of law. The appellate court summarized its reasoning for doing so as follows:

> "An officer who had witnessed a purported drug transaction and who had made an identification of the seller could easily rationalize the shortcomings of the evidence; such a lapse at most reveals a mistake in judgment. The Supreme Court has stated: 'The qualified immunity standard "gives ample room for mistakes in judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law" 36 F.3d at 557.

The appellate court went on to hold as follows:

> "Thus, we believe that a reasonable officer in Inspector Winston's position, looking at our case-law on probable cause generally, could have concluded that Mr. Maltby committed the crime. Consequently, Inspector Winston is entitled to qualified immunity." 36 F.3d at 558.

The appellate court's *de novo* analysis was not limited to a review of the clearly established law. The appellate court, in essence, retried *de novo*, the jury and trial judge's determinations to place Winston outside the realm of a "reasonably well-trained police officer" based on their application of the law to the facts and decided, based on its *de novo* retrial of the facts, that Winston's actions represented a "mere mistake in judgment" which placed him inside the qualified immunity safe harbor from liability. In reaching its decision, the appellate court identified the following facts it believed could lead a reasonable police officer to believe Maltby was the suspect in the Dairy Queen transaction:

> "Hankins' identification, prior to the Dairy Queen incident, that the man selling the drugs would be Kerry Maltby; Hankins' information that the seller would be arriving in a brown Ford; Inspector Winston's observations of a male parked in a brown Ford in the Dairy Queen parking lot; Hankins' introduction of the man in the Ford as "Kerry"; Inspector Winston's observation of the undercover purchase; Inspector Winston's observation of the man in the Ford driving past his surveillance position; Inspector Sage's report of purchasing 1.1 grams of LSD from Kerry Maltby; and Inspector Winston's viewing of Maltby face-to-face after the incident." 36 F.3d at 556.

The appellate court also recognized other facts which undermined the belief Maltby was the man at the Dairy Queen:

> "First, Hankins . . . left town after being confronted with information he was engaged in illegal activity. Second, the brown Ford was not registered to Mr. Maltby but to a Virgil Riley. Finally, when Mr. Maltby was questioned about the incident, he denied all knowledge of the transaction." 36 F.3d at 556, 557.

C. Omitted Facts

In reaching its decision, the appellate court disregarded a great deal of facts introduced at trial which contradicted

the facts the appellate court relied on or which favored Maltby and were not mentioned. Maltby will briefly summarize several categories of undisputed facts germane to the issue of qualified immunity which were omitted by the appellate court.

1. Informant information. Hankins was implicated in three Task Force undercover drug purchases in late 1986 and early 1987 and agreed to become an informant in the hope of receiving lesser punishment for his offenses (T. at 29-30). Hankins did not provide a street address or phone number for the Dairy Queen suspect or tell Winston how long he had known "Maltby" or how Hankins was able to set up the purchase (T. at 35-6). Hankins billed the Dairy Queen transaction as a drug purchase rather than a look-alike transaction (T. at 36). Purchases in two other transactions Hankins set up near the time of the Dairy Queen transaction were supposed to be controlled substances but both turned out to be look-alike substances (T. at 60, 106-7, 132-3). The Task Force investigated no look-alike cases in 1985, one in 1986, and two in 1987, not including the Dairy Queen transaction. (T. at 431).

2. Winston's view. Winston had never seen the suspect before, did not use anything to enhance his vision during the transaction, and could not actually see the suspected controlled substance or the money for the substance change hands during the transaction (T. at 22-3, 44-5). The suspect turned his face toward Sage during most of the transaction (T. at 162). Winston could not determine how tall the suspect was, his weight or see the full length of his arms (T. at 48). The suspect never used a name or identified himself (T. at 163).

3. Vehicle registration. Winston's Task Force supervisor, Illinois State Police, Department of Criminal Investigations, (DCI) Sergeant Kempf told Winston to follow up on the variance between the registration of the car used in the

Dairy Queen transaction and the name "Kerry Maltby" (T. at 245). Winston did not do so (T. at 54). DCI had written intelligence files, which were available to Task Force officers (T. at 370-1). Agents rely on these files and should check them when a name comes up to see if a file exists (T. at 370-1). DCI had an intelligence report dated February 5, 1987 which indicted Virgil Riley and other members of his family grew and sold cannabis in the Beardstown area (T. at 439-41). During the Dairy Queen transaction, the suspect told Sage the suspect was growing marijuana plants in the Beardstown area that he would harvest later (T. at 164-5).

4. Post-arrest actions. After Maltby's preliminary hearing, the State's Attorney instructed Winston to verify Maltby's identification, which Winston agreed to do (T. at 394-6, 405). The State's Attorney and Sergeant Kempf told Winston to follow up on the alibi information Maltby's defense attorney provided to the State's Attorney and question the alibi witnesses (T. at 256-7, 532-3). After several follow-up requests for information by the State's Attorney, Winston spoke with the alibi witnesses in the general time of when Maltby was released (T. at 121, 533-5, 537-8).

5. Sage's viewing of Maltby. Winston saw Sage on a weekly basis and frequently on a daily basis from June 1987 until the time of Maltby's release, except for a brief vacation Sage took (T. at 24-5). The day of Maltby's release was the first time the State's Attorney was advised by Winston that Sage had not previously viewed Maltby (T. at 514-5, 540). Upon learning this and that Sage wanted to view Maltby in person, the State's Attorney instructed Winston and Sage to go to the jail to do so and call her as soon as they did, even if she were at home (T. at 539-540, 548). Sage based his conclusion that Maltby was not the suspect at the Dairy Queen transaction in part on the fact Maltby had tattoos on his arms and the suspect in the Dairy Queen transaction did not have tattoos and the sus-

pect in the Dairy Queen transaction had acne and Maltby did not have acne (T. at 151-2). In spite of this, Winston still believed at trial he was right about his identification of Maltby (T. at 121, 588-9).

6. Reasonable police officers and procedures. Sage testified it is important to identify people in law enforcement, that a police officer has many different ways available to identify a person, and should use every method available to try to identify someone (T. at 179-80). Kempf testified the police must develop facts in a case and follow obvious leads (T. at 244-5). Police officers should be cautious in the assumptions they make in investigation and should deal with facts rather than assumptions (T. at 248). The difference between an assumption and a fact is decided by an investigation. *Id.* In a situation where more than one person has observed what looks like criminal activity, the police should consult with all available persons and are especially interested in contacting the person with the best and the longest view (T. at 247).

DCI Captain Collins testified a police officer should use common sense to determine that a crime has been committed and that the individual to be arrested committed it (T. at 358). Police officers should use all of their witnesses in cases with multiple witnesses (T. at 576). Police procedures require a follow-up to be done if a question arises about the integrity of an informant or the identity of a suspect (T. at 365).

Kempf testified when police officers deal with known lawbreakers, they must be careful in their dealings (T. at 209). An informant's reliability must be current (T. at 239). Success in the past, does not give an informant a clean bill of health in the future. *Id.* If information is obtained that indicates an informant has acted in an illegal fashion, that heightens the caution level the police should use with that informant (T. at 240).

When Winston was a patrolman, he attempted to investigate a case to its fullest and considered his job to be a fact finder (T. at 95). He understood all pertinent information in an investigation, positive or negative, should be recorded in written reports and passed on to the State's Attorney. *Id.* When Winston was a patrolman, he interviewed all available witnesses to a crime, including those closest to it, and took into account the viewing positions of the witnesses (T. at 95-7). He learned that sometimes a witness has selected (sic) perception (T. at 97). He meant by that what a witness says he saw is not necessarily what happened. *Id.* Sometimes things color a witness' perception and the person does not see an incident accurately. *Id.* When Winston was a patrolman, he had all witnesses identify a suspect separately to get a one-on-one opinion from each witness (T. at 98). Winston agreed Sage had a better view of the person at the Dairy Queen than Winston had (T. at 134). Winston did not believe any informant's reliability would be good forever (T. at 138).

7. Maltby's expert. In the opinion of Maltby's expert, Dr. Steve Egger, Winston's factual investigation was a flagrant violation of police procedure (T. at 479). His opinion was based, in part, on the fact there was minimal effort to identify the individual, there was no documentation of the alibi witnesses, and the amount of delay in attempting to verify Maltby's identity (T. at 479-80). (Note: In the course of the denying Maltby's cross-appeal, the appellate court stated: "There is no doubt Dr. Egger was an expert as to general police procedure." 36 F.3d at 564.)

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS DECISION REFLECTS A SPLIT OF AUTHORITY ON THE STANDARD OF REVIEW IN THE SEVENTH CIRCUIT. THIS ISSUE HAS ALSO ARISEN IN NINE OTHER CIRCUITS AND CONFLICTING CONCLUSIONS HAVE BEEN REACHED ON IT.

A. Introduction. It cannot be questioned that *Malley*, *id.* represents the clearly established law for determining liability for an arrest based on a warrant. As the appellate court correctly observed, this Court adopted the "reasonably well-trained police officer in officer's position" as the standard for determining entitlement to qualified immunity in *Malley*, *id.* This Court held in *Malley*, *id.* if officers of reasonable competence could disagree on the issue of whether probable cause existed to support an application for a warrant, immunity should be recognized. 475 U.S. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 278. The Court went on to note the standard gives ample room for mere "mistaken judgements". 475 U.S. at 343, 106 S.Ct. at 1097, 89 L.Ed.2d at 280. The Court concluded, conversely, that qualified immunity does not protect "the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 278. The real battle raised in this case, is not with these principles, but rather is based upon how they are applied to determine the point on the spectrum of conduct where mistaken judgment ends and plain incompetence or knowing violation of the law begins and how that trial level determination is reviewed on appeal. *Malley*, *id.* did not address these issues directly.

As the Seventh Circuit acknowledged in its decision, its application of a *de novo* standard of review to the trial court's determination of the qualified immunity issue conflicted with other Seventh Circuit cases that applied a clearly erroneous standard of review to the issues. In addition, as set forth, infra, (pg. 12-15) many other Circuits, in-

cluding the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh have struggled among themselves and sometimes even in different cases within the same circuit with the issue of whether qualified immunity is a pure question of law or an issue of fact subject to resolution by a jury and the appropriate standard of review. This Court should decide these important and troublesome issues for the benefit of all citizens of the United States. The record shows the jury and the trial court actually heard evidence on the actions of the "reasonable police officer" from Winston, other officers and Maltby's expert. The fact the jury and the trial judge resolved the issue of qualified immunity against Winston based on the facts and the appellate court determined the issue was a pure question of law provide this Court with an opportunity to review both alternatives and determine if the issue is one of fact or pure law. By deciding the factual or legal nature of the issue, the Court will, in turn, definitively establish the appropriate appellate level standard of review for the benefit of all future cases, as the Court did in cases based on Title VII and 42 U.S. 1981 in the case of *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-1, 72 L.Ed.2d 66, 80-1 (1982).

B. Appellate court conflict. In the absence of explicit authority from this Court, the appellate courts have struggled with the issue of whether the trial level determination that a public official's actions represent a "mere mistake in judgment" or "plain incompetence or a knowing violation of the law", in a situation where the law is clearly established in a particularized sense, is an issue of fact or law and the appropriate appellate standard of review of the trial level determination. In the course of this struggle, the appellate courts have reached opposite conclusions on the nature of the issue at the trial level and the standard of review applied to the trial level determination.

One line of cases represented by the instant case from the Seventh Circuit and cases from the First, Second, Fifth, Sixth, Eighth, Tenth and Eleventh circuits has held the application of the "reasonable government official" standard is a question of law solely for consideration of a trial judge and is subject to *de novo* review on appeal. See *Garionis v. Newton*, 827 F.2d 306, 309 (8th Cir. 1987). (Jury trial in an unconstitutional arrest case. The court held the submission of the issue of qualified immunity to the jury was erroneous.); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 561 (1st Cir. 1988) cert. denied 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988). (Jury trial in a case based on death of a prisoner. "Application of the 'legally reasonable' standard is for the court, not the jury."); *Jennings v. Joshua Independent School Dist.*, 877 F.2d 313, 317 n.2. (5th Cir. 1989) cert. denied 496 U.S. 935, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990). (Jury trial in an illegal search case. "[T]he issue of Stevens' immunity under *Malley* is one for the court to decide as a matter of law."); *Melton v. City of Oklahoma City*, 879 F.2d 706, 726 (10th Cir. 1989) vacated 928 F.2d 920 (10th Cir. 1991) and cert. denied ____ U.S. ____ 112 S.Ct. 296, 116 L.Ed.2d 241 (1991). (Jury trial in a police officer discharge case based upon exercise of First Amendment rights. "The application of immunity defenses is a question of law. . . This court reviews those issues *de novo*. Those issues should not have been submitted to the jury.); *Coffman v. Trickey*, 884 F.2d 1057, 1062-3 (8th Cir. 1989) cert. denied 494 U.S. 1056, 110 S.Ct. 1523, 108 L.Ed.2d 763 (1990). (Jury trial in a prison case regarding punishment. "[W]hether legal norms allegedly violated by defendant were clearly established at the time of the challenged action. . . This is a question of law determined by the trial court." Error to submit instruction to the jury.); *Warren v. Dwyer*, 906 F.2d 70, 76 (2nd Cir. 1990) cert. denied ____ U.S. ____, 111 S.Ct. 431, ____ L.Ed.2d ____ (1990). (Jury trial in an unconstitutional arrest case. "The

better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law. . . If there are unresolved factual issues which prevent an early disposition of defense, the jury should decide these issues on special interrogatories."); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). (Jury trial in an excessive use-of-force case. "We reiterate that qualified immunity is a question of law for the court to decide. . . Accordingly, once the defense of qualified immunity has been denied pre-trial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity."). *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 998 (6th Cir. 1994). (Jury trial in an unconstitutional search case. "Resolution of qualified immunity is a question of law for the district court (citation omitted). . . Because the issue of qualified immunity is a legal question, no deference is due the district courts conclusion."

Another line of cases from the Second, Fourth, Fifth, Seventh, and Ninth circuits has held the application of the "reasonable government official" standard can be decided by the jury and is subject to a deferential standard of review on appeal. See *Brady v. Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988) cert. denied 489 U.S. 1100, 109 S.Ct. 1577, 103 L.Ed.2d 943 (1989). (Jury trial in a discharge case based on failure to provide a name clearing. "Whether at the time of the challenged action the legal norm allegedly violated by an official was clearly established is a question of law. (citation omitted). Whether a reasonable official would know that she is violating the clearly established law as a question for the jury."); *Melear v. Spears*, 862 F.2d 1177, 1185 (5th Cir. 1989). (Jury trial in an unconstitutional search case. "Thus, the law was 'clearly established' under the circumstances of this case, and the jury's decision that Avirett's conduct was objectionably unreasonable must remain untouched."); *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). (Denial of summary judgment in an uncon-

stitutional arrest case. "Ruling on a defense of qualified immunity therefore requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that doing what he did would violate that right. The first two of these present pure questions of law for the courts. (citation omitted) The third, which involves application of *Harlow's* objective test to the particular conduct at issue, may require factual determinations respecting disputed aspects of that conduct."); *Mahoney v. Kesery*, 976 F.2d 1054, 1059 (7th Cir. 1992). (Jury trial in an unconstitutional arrest case.) *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993). (Jury trial in an unconstitutional arrest case. In the face of "disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.") *Oliveira v. Mayer*, 23 F.3d 642, 649, 650 (2nd Cir. 1994) petition for cert. filed 94-526. (Unconstitutional arrest case. "[W]e think the District Court erred by not submitting the qualified immunity issue to the jury. Though we have decided as a matter of law that the plaintiffs were arrested and this arrest was without probable cause, these holdings do not necessarily mean that it would be unreasonable for a jury to conclude it was objectively reasonable for the police to believe that their detention of the plaintiffs was only a *Terry* stop or that they possessed probable cause to make an arrest.").

This Court should grant certiorari to resolve this raging conflict in the Circuits.

II.

THE COURT OF APPEALS MISINTERPRETED SUPREME COURT PRECEDENT IN ADOPTING ITS DE NOVO STANDARD OF REVIEW.

The appellate court relied upon this Court's decisions in the cases of *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092,

89 L.Ed.2d 271 (1986) and *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) in support of its decision to apply a *de novo* standard of review to the jury and district court's denial of qualified immunity (36 F.3d at 555-6 n.7) Maltby respectfully submits the appellate court badly misinterpreted these decisions. Neither of them adopted a *de novo* standard of review for qualified immunity determinations. In addition, language in the decisions actually undermines, rather than supports, a *de novo* standard of review.

In *Malley*, *id.*, the plaintiffs filed an action charging, *inter alia*, that the defendants violated their rights under the Fourth and Fourteenth Amendments of the U.S. Constitution in applying for warrants. The case was tried by a jury and at the close of the plaintiffs' evidence, the police officer was granted a directed verdict. The First Circuit Court of Appeals reversed. The Supreme Court granted certiorari in order to review the First Circuit application of the "objective reasonableness" standard in the arrest warrant context, affirmed the appellate court's reversal and remanded the case for further proceedings. In doing so, this Court stated in its opinion:

> "The question is not presented to us, nor do we decide, whether [defendant's] conduct in this case was in fact objectively reasonable. That issue must be resolved on remand." 475 U.S. at 345 n.8, 106 S.Ct. at 1098 n.8., 89 L.Ed. 2d at 281 n.8.

Presumably, on remand, the plaintiffs would be entitled to a new jury trial to apply the law to the facts. If the Court felt the application of the law to the facts was a pure question of law, the Court surely would have instructed the trial court to decide the issue on its own and prohibited a new jury trial.

In addition, in the course of adopting the standard of whether a reasonably well-trained officer in the officer's position would have known his affidavit failed to establish

probable cause and that he should not have applied for the warrant as the basis for police officer liability in *Malley*, *id.*, the Court explained the standard as the equivalent of "the range of professional competence expected of an officer". 475 U.S. at 346 n.9, 106 S.Ct. at 1098 n.9, 89 L.Ed.2d at 281 n.9. In essence, conduct that is outside of the "range of professional competence" is akin to constitutional law malpractice, albeit with a heightened standard of proof due to the qualified immunity defense. Courts, traditionally, decide malpractice cases based on the facts and they are therefore governed by a clearly erroneous standard of review rather than a *de novo* standard.

In the case of *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), an arrestee brought a civil rights claim against secret service agents. The trial court denied the defendants' summary judgment motion based on the issue of qualified immunity. The Ninth Circuit Court of Appeals affirmed. This Court granted certiorari and reversed based on a summary disposition. The Court held the undisputed facts of the case showed that even if the defendants erred in concluding probable cause to arrest the plaintiff existed, the agents were nonetheless entitled to qualified immunity because their decision was reasonable, even if mistaken. 502 U.S. at 228-9, 112 S.Ct. at 537, 116 L.Ed.2d at 596. This Court made the following criticism of the Ninth Circuit's decision, which had focused primarily on the issue of probable cause to the exclusion of qualified immunity:

> "This statement of law is wrong for two reasons. First, it *routinely* places the issue of immunity in the hands of the jury. Immunity *ordinarily* should be decided by the court long before trial . . . (citation omitted). Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, . . ." (emphasis added by counsel) 502 U.S. at 228, 112 S.Ct. at 537, 116 L.Ed.2d at 596.

It is important to note the Court *did not* state in its analysis the reasonableness of an officer's belief that the situation at hand constituted probable cause could *never* be decided by a jury or that the question must *always* be decided by the court long before trial. In fact, the Court's use of the words "routinely" and "ordinarily" is implicit recognition the issue might not be the proper subject of resolution by the court "long before trial" in all cases and the application of the law to the facts could be the subject of jury determination in appropriate cases.

Therefore, based upon the foregoing, the cases of *Malley v. Briggs*, *id.* and *Hunter v. Bryant*, *id.* do not support the appellate court's decision to apply a *de novo* standard of review in this case. In both cases, this Court stopped well short of adopting such a standard of review, even though it had the opportunity to do so in both cases if it wished. The Court's language in both cases implicitly rejected the *de novo* standard of review adopted by the appellate court.

III.

THE LAW, IN THE CONTEXT OF WINSTON'S ACTIONS, WAS CLEARLY ESTABLISHED AND THE COURT OF APPEALS' DECISION IS ERRONEOUS.

In the case of *Elder v. Holloway*, ____ U.S. ____, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344, 351 (1994), an unanimous court held that one aspect of the qualified immunity analysis, whether an asserted federal right was clearly established at a particular time so that a public official who allegedly violated the right did not have qualified immunity from suit, presents a question of law that is resolved *de novo* on appeal. After adopting this principle, the Court remanded the case to the court of appeals with instructions to consider *all* relevant authority on the issue of the state of the law, not simply the cases cited by the parties or discovered by the district court, ____ U.S. ____, 114 S.Ct. at 1021, 127 L.Ed.2d at 348. Therefore, the appellate court in

this case was duty bound to review all relevant precedent on the state of the law. However, it failed woefully in this regard in its analysis of the clearly established law component of qualified immunity when it concluded:

> "[W]e believe that a reasonable officer in Inspector Winston's position, looking to our case-law on probable cause generally, could have concluded Mr. Maltby committed the crime." 36 F.3d at 558.

In reaching its conclusion, it did not cite a single case on probable cause with facts that even remotely resembled the facts of this case that allowed a police officer to escape liability on the basis of qualified immunity. In this case, Winston's request for a warrant was based on a brief glimpse of the suspect in an undercover transaction that was arranged by an informant who was charged with acting in an illegal fashion shortly after the transaction. Winston did not attempt to identify the suspect until approximately 8 weeks after Winston's brief glimpse. Winston did not check his identification of Maltby as the suspect with Winston's fellow officer, who had dealt face- to-face with the suspect for 13 minutes prior to Maltby's arrest and failed to do so for another 60 days after Maltby's arrest. Maltby submits to this Court, as he did to the appellate court, that the lack of a case with facts similar to Winston's actions does not demonstrate the unlawfulness of this conduct was not clearly established. Instead, it can be best explained by the following observation which was made in the case of *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992):

> "[T]he behavior alleged is so egregious that no like case is on the books. . . The easiest cases don't arise."

See also *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994) ("This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles.")

Immediately prior to the appellate court's statement, without citation of authorities, that a reasonable police officer could have believed Maltby committed the crime looking to probable cause case-law generally, the appellate court stated:

> "It was incumbent on Plaintiff to prove it was readily apparent to Inspector Winston, given the law of probable cause in existence at the time, that his actions were unlawful." 36 F.3d at 558.

Based on this passage, one might get the impression Maltby's counsel failed to present relevant authority on the issue of the clearly established law. Any such impression is simply not true. Maltby proved to the jury, which as noted previously received an instruction on qualified immunity as established in *Malley*, *id.* and on *six* different occasions to Magistrate Evans and Judge Mills that the law was clearly established in a particularized manner in relation to the facts of this case in the following manner (see App. 47, 60, 61, 63, 66 and 68).

A. Clearly Established Law—Readily available information. Maltby's appellee brief cited cases from the First, Fourth, Seventh and Eleventh Circuits which demonstrated it was clearly established in 1987 that the existence of information which was readily available to the police officer and ultimately conclusively negates the issue of probable cause is relevant in determining if the officer's purported probable cause determination is objectively reasonable. The case of *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) succinctly sets forth the basic principle:

> "A police officer may not close his or her eyes to facts that would clarify the circumstances of an arrest. . . In the present case Hucal had at least four sources of information available to him; he simply chose not to ask anything of anyone.
>
> . . .

> Although the police must be allowed some margin of error, a police officer evaluating a situation for probable cause must utilize the means at hand to minimize the risk of error.
>
> . . .
>
> In the above probable cause analysis we decided that Hucal had acted unreasonably in failing to make further inquiry. Applying *Malley*, we agree with the magistrate that no reasonably well-trained officer could have come to Hucal's conclusion, viewing the situation objectively."

See also *Moore v. The Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1345-6 (7th Cir. 1985) ("This entire episode may have been avoided if the officer who received the original complaint and the arresting officers had used reasonable judgment and conducted a proper investigation, inquiring both as to the plaintiffs' presence in the restaurant and the dispute over the bill. Once explanations were provided, further investigation could have been commenced in an attempt to resolve the dispute in a reasonable manner. . . [I]t is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention."); *Sevigny v. Dicksey*, 846 F.2d 953, 958 (4th Cir. 1988) ("Had Dicksey learned what easily could have been learned, and in common prudence should have been, there is reason to doubt that any arrest would have been made. To the extent, therefore, that Dicksey made his arrest on a misapprehension of the facts confronting him, his misapprehension was not a reasonable one."); *Clipper v. Takoma Park, Md.*, 876 F.2d 17, 20 (4th Cir. 1989); *Tillman v. Coley*, 886 F.2d 317, 321 (11th Cir. 1989); and *Rodriguez v. Comas*, 888 F.2d 899, 902 (1st Cir. 1989) ("[H]e should have availed himself of these easily accessible sources. . .") Maltby also cited in his brief the case of *Goodwin v. Metts*, 885 F.2d 157, 164 (4th Cir. 1989) (cert. den. 494 U.S. 1081,

110 S.Ct. 1812, 108 L.Ed.2d 942 (1990) in which the court held: "An officer cannot invoke qualified immunity where he 'did not avail himself of readily available information' . . .". The appellate court did not analyze, criticize, or distinguish this line of clearly applicable cases. It just simply ignored them.

B. Clearly Established Law—Identification of suspect and viewing. The law was well established that when an arrest is not made at the scene of a crime, the identity of a suspect must be confirmed promptly. *Tillman v. Coley*, 886 F.2d 317, 321 (11th Cir. 1989). In the case of *U.S. v. Valez*, 796 F.2d 24, 27 (2nd Cir. 1986), cert. den. 479 U.S. 1067, 107 S.Ct. 957, 93 L.Ed.2d 1005 (1987), the court stated as follows on the issue of identification:

> "We agree that where a police officer has or *should have doubts* (emphasis added by counsel) whether a detained suspect is in fact the person sought, the officer must make 'immediate reasonable efforts to confirm the suspect's identity'."

The pure folly of Winston's decision to attempt to identify Maltby eight weeks after the Dairy Queen transaction based upon Winston's brief glimpse of the suspect as the suspect drove away from the scene and his failure to check his subjective belief Maltby was the man with Winston's fellow officer with the best view of the suspect prior to Maltby's arrest is self-evident. When Winston called Maltby in for questioning some eight weeks after the Dairy Queen transaction and approximately a week before Maltby's arrest, Winston could have conducted in essence a show-up, albeit belated, identification of Maltby by the main officer who dealt face-to-face with the suspect in the Dairy Queen transaction, Sage. Winston's failure to do so is strikingly similar to the case of *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989), which was based on an October 1985 first buy in an undercover drug investigation. The plaintiff was arrested three months after the transaction. The undercover

officer viewed the plaintiff at the time of her arrest and immediately said she was not the person who had sold him drugs. The court rejected the Sheriff's qualified immunity defense and noted the undercover officer could have identified the plaintiff as the suspect through other means prior to her arrest. 886 F.2d at 321. Not only did Winston not make any effort for the main witness to view Maltby during the nine weeks between the time of the Dairy Queen transaction and Maltby's arrest later, he did not do so until the 60th day following Maltby's arrest. This represents a gap of roughly 17 weeks between the time of the transaction and identification of the suspect by the main eyewitness! Maltby respectfully submits this failure is simply not something that can be "easily rationalized" as done by the appellate court. 36 F.3d at 557.

Winston attempted to excuse his failure to check with Sage sooner, by asserting that his own so-called "good look" of the suspect established probable cause. Unfortunately for Maltby, the appellate court implicitly accepted this assertion. As far as Maltby can discern, the basic premise of this assertion is that Winston stood in a position akin to a victim of a crime based on his brief glimpse of the suspect and therefore information from Winston as a "victim" of the crime established probable cause on a per se basis. However, the actual state of the law is contrary to Winston's position. Information from an asserted victim of a crime does not establish probable cause on a per se basis. *Lewis v. Kendrick*, 944 F.2d 949, 952 (1st Cir. 1991) and *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 9-10 (1st Cir. 1984). (Note: Justice Breyer was on the panel for each case.) In addition, in the case of *Coates v. Daugherty*, 973 F.2d 290 (4th Cir. 1992), the view of police officers, who arrested two suspects for shoplifting at the Springfield Mall in Fairfax, Virginia, was at the center of that case. The case was tried by a jury and the jury was instructed on qualified immunity. The plaintiffs won and the defendants' JNOV

motion was denied. The appellate court indicated, in affirming the jury verdicts that its power of review was limited by the Seventh Amendment of the U.S. Constitution which provides:

> "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." 973 F.2d at 293.

The court went on to hold that the determination of whether the defendants' view of the plaintiffs was sufficient for a reasonable police officer to believe he had probable cause to arrest the plaintiffs was a question of fact and properly the subject of resolution by the jury. 973 F.2d at 294.

C. Clearly Established Law—Cases based on information from informants. The manner of establishing probable cause in cases based on information from an informant was also well established at the time of Maltby's arrest by the case of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). This Court adopted the "totality of the circumstances" standard in such cases and recognized the need for police investigation and corroboration in assessing information from an informant. 462 U.S. at 241-5, 103 S.Ct. at 2334-5, 76 L.Ed.2d at 550-2. The appellate court held in the instant case that the information from Hankins about the Dairy Queen transaction was corroborated because the transaction took place basically in the fashion Hankins' stated it would, except for the fact a look-alike substance was purchased rather than drugs. However, within a matter of days after the Dairy Queen transaction, information surfaced which indicated Hankins was acting in an illegal fashion by providing substances to others to be sold to Task Force agents and that Hankins intended to split the proceeds of these sales with the party involved. In addition, Hankins failed to maintain contact with Winston after Winston challenged Hankins with this information, which was a violation of Hankins' duties as an

informant. Maltby's arrest was not made until roughly nine weeks *after* Hankins' disappearance. Other than Winston's interview with Maltby a week before his arrest, what "corroboration" did Winston make of Hankins' claim the suspect was "Kerry Maltby"? The obvious answer is none. Furthermore, and perhaps even more damning, Winston never corroborated Hankins' information about the identity of the suspect with Sage until the 60th day after Maltby's arrest. When Sage viewed Maltby, Winston's so-called "corroboration" imploded in 3 seconds when Sage told Winston that Maltby was not the man at the Dairy Queen. At that point, Winston's identification was exposed as worthless. Maltby submitted authority in his brief which demonstrated it was well established that police officers can be liable for an arrest based on a identification ultimately considered to be worthless. See *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988), which was based on an arrest that occurred in 1981. Amazingly, although the court of appeals referred to *Jones, id.* in its opinion, it made no reference whatsoever to this aspect of the case.

The appellate court also blindly accepted Winston's testimony he was not concerned about the variance between the name "Kerry Maltby" Hankins gave for the suspect and the registration of the car to Virgil Riley because "those participating in drug transactions often use cars belonging to other people." 36 F.3d at 557. However, the appellate court made no reference to the undisputed fact Winston was specifically instructed by his supervisor to investigate that variance and Winston failed to do so. In addition, although the appellate court was careful to note Winston checked with DCI when Hankins became an informant and was told Hankins was considered to be a reliable informant by DCI, it made no reference to the fact that DCI received an intelligence report four months prior to the Dairy Queen transaction that indicated Virgil Riley and his family actively sold marijuana or the fact the suspect in the Dairy Queen

transaction made a statement about marijuana that was consistent with the intelligence report.

Maltby respectfully submits these inactions on Winston's part fell far short of the need for police investigation and corroboration mandated by this Court in the case of *Illinois v. Gates*, 462 U.S. 213, 241-5, 103 S.Ct. 2317, 2334-5, 76 L.Ed.2d 527, 550-2 in cases based on information from an informant.

D. Clearly Established Law—Gravity of offense and probable cause. The appellate court was quick to note the sale of look-alike substances is illegal (36 F.3d at 551 n.1), but, it made no reference to the clearly established law that the gravity of the offense bears on the issue of probable cause. *Llaguno v. Mingey*, 763 F.2d 1560, 1566 (7th Cir. 1985) (en banc) cert. dismissed 478 U.S. 1044, 107 S.Ct. 16, 92 L.Ed.2d 783 (1986); *BeVier v. Hucal*, 806 F.2d 123, 127 (7th Cir. 1986) and *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589, 596 (1991). Although admittedly, the driver of the Ford at the Dairy Queen committed a crime by selling a look-alike substance, this was by no means a heinous crime which required prompt action. Winston did not see the need to seek an arrest warrant until nine weeks after the purchase. Applying the clearly established sliding scale probable cause analysis to the trivial nature of the offense at issue (i.e. deceit of the drug buying public), a police officer should investigate his subjective belief as to the identity of a suspect thoroughly before seeking an arrest warrant.

E. Clearly Established Law—Presumption of innocence. Winston, and the appellate court, made light of the fact Maltby denied any knowledge of the Dairy Queen transaction during Winston's pre-arrest interview of Maltby. In doing so, Winston and the appellate court, in essence jettisoned the U.S. Constitution's Fifth Amendment presumption of innocence and case law from this Court. In

the case of *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 2387, 115 L.Ed.2d 389, 400 (1991) this Court stated:

> "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure (citations omitted).

See also *Rodriguez v. Comas*, 888 F.2d 899, 903 (1st Cir. 1989).

F. Clearly Established Law—Post-arrest actions and effect on prosecution. The appellate court held that Winston's post-arrest conduct did not bear on the issue of probable cause because it is determined "at the moment of the arrest is made." 36 F.3d at 557. Maltby freely acknowledges that is the general legal standard. However, counsel submitted at oral argument that the post-arrest evidence was relevant in two respects. First, it showed that other participants in the criminal case, the State's Attorney and Maltby's defense attorney, readily recognized the importance of the identification issue, which should have been apparent to Winston, too. Second, Winston's post-arrest slipshod actions could have been considered by the jury and the trial judge to be the continuation of a pattern of actions that fell below the standard of a reasonable police officer which reflected adversely on the effectiveness of Winston's pre-arrest actions. The facts undisputedly demonstrated that throughout the investigation, pre-arrest and post-arrest, Winston was willing to turn a blind eye to anything that might undermine Hankins' claim the person at the Dairy Queen was "Kerry Maltby" and Winston's subjective belief Maltby was the suspect. Winston's pigheadedness about his beliefs was aptly demonstrated at trial, which took place nearly five years after the Dairy Queen transaction, when he claimed he was right about his identification of Maltby and Sage was wrong (T. at 588-9). (See *Jones v. Chicago*, 856 F.2d 985, 990 (7th Cir. 1988) for an example of a similar trial strategy on the issue of identification that backfired.)

Also, the appellate court distinguished the case of *Whitley v. Seibel*, 613 F.2d 682, 686 (7th Cir. 1980) cert. den. 459 U.S. 942, 103 S.Ct. 254, 74 L.Ed.2d 198, (1982), which stands for the proposition that an officer who intentionally misleads those who have the authority to authorize an arrest may be liable for an arrest, by asserting Maltby had not demonstrated the actions of the prosecutor would have been different if she had been told of the allegations of misconduct involving the informant. 36 F.3d at 557-8 n.9, 10. However, the appellate court failed to address the information Winston withheld on Maltby's identification. Winston kept the fact that Sage hadn't viewed Maltby from the State's Attorney until the day of Maltby's release. The State's Attorney's immediate reaction, upon learning this and that Sage wanted to view Maltby, was to instruct Winston and Sage to go to the jail for Sage to view Maltby and to call her as soon as this was done, even if she were at home (T. at 539-40, 548). In reaching its decision, the appellate court made no reference to the fact that in the case of *Jones v. Chicago*, 856 F.2d 985, 993 (7th Cir. 1988), a case the appellate court cited in its opinion, the court recognized that failing to apprise the prosecutor of the questionable nature of a victim's identification of the suspect can establish liability on the part of the police officer if the omitted information might have negated the State's Attorney's decision to even bring a criminal charge. Actions speak louder than words. The State's Attorney's actions show she would have acted differently if she had been told of this information, initially.

G. Clearly Established Law—Police officer evidence. Finally, the *Reasonable Police Officers and Procedures* section of the *Omitted Facts* irrefutably demonstrates reasonably well-trained police officers were well aware of the basic probable cause principles cited by Maltby and that Winston's actions fell far below the standard of a reasonably well-trained police officer. Everyone in the trial court-

room, Winston, the other police officers, the jury, and Judge Mills, knew, based on the evidence, that a reasonable police officer who had a brief view of the suspect should check with the main eyewitness in a case that was initiated on the basis of information from an informant who had disappeared long before the arrest was made. The awareness of these legal principles by real live police officers on the street shows they are clearly established, notwithstanding the appellate panel's contrary view of the law from the 27th floor of the U.S. Courthouse in Chicago. To borrow language the author of the appellate court opinion, Judge Ripple, used in his dissent in the case of *Rakovich v. Wade*, 850 F.2d 1180, 1217 (7th Cir. 1988) (en banc), cert. den. 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988):

> "Not only does the average American law enforcement officer understand this basic proposition, the average American third grader does as well."

Based on the evidence concerning the actions of reasonable police officers, police procedures, and Maltby's expert, it is little wonder that when the jury was instructed it could award punitive damages based on malicious, wanton or oppressive misconduct, it awarded them to Maltby! Maltby submits that Winston's decision to, in the words of Judge Ripple again: "easily rationalize shortcomings of the evidence" (36 F.3d at 557) was correctly determined to be totally unjustified and unwarranted in the eyes of the jury and the trial judge based on the clearly established law.

IV

THE QUESTIONS PRESENTED ARE IMPORTANT.

Undercover task force investigations and delayed arrests represent common methods of law enforcement in this day and age. As this case aptly demonstrates, when police officers delay making an arrest in an undercover investigation, the delay creates a risk that the person they ultimately arrest is not the person involved in the undercover trans-

action and a risk of unconstitutional harm for the general citizenry. This Court recognized the importance of providing compensation to law-abiding citizens innocent of any crime, who are victims of unconstitutional conduct in the cases of *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986) and *Elder v. Holloway*, ____ U.S. ____, 114 S.Ct. 1019, 1022-3, 127 L.Ed.2d 344, 350 (1994). If the instant case is allowed to stand, the Fourth Amendment constitutional rights of our nation's citizens and the right of victims of such conduct to be compensated will be diminished. Citizens, nationwide, will be subject to the risk of an arrest based on questionable investigations without the need for the police to check with the main available eyewitnesses on the issue of the person's identity. In response to such a plight by an innocent party, the police will be able to avoid not only liability, but even trial itself, by pointing to this case to show that they are entitled to qualified immunity in such circumstances. As a result, not only will Maltby suffer a violation of his constitutional rights without compensation, but other citizens will needlessly do so as well.

CONCLUSION

The foregoing demonstrates the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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